(2)

Single Bench (Criminal)

IN THE HIGH COURT OF MADHYA PRADESH : AT JABALPUR.

CRIMINAL APPEAL NO. 1187 OF 1989.

1. Panji s/o Kedar Kewat aged about 21 years,
2. Khamhan s/o Baraj Kewat aged about 25 years,
3. Faggu s/o Parsu Kewat aged about 25 years,

All R/o Village: Kanamukka P.S. Amanpur, Distt. Raipur (MP).

..... APPELLANTS (IN JAIL)

VERSUS

The State of Madhya Pradesh ..... RESPONDENT.

CRIMINAL APPEAL U/s.374(2) OF THE CR.P.C.

9743

19-12-89

J.K. Gupta.

19/12/89

(38)

F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.1187/1989

Single Bench: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Panji and others

Versus

State of Madhya Pradesh (now State of Chhattisgarh)

Shri Kishore Bhaduri, Advocate with Shri Roop Naik, Counsel for the appellants.
Shri Ashish Shukla, Govt. Advocate for the State

JUDGMENT

(Delivered on this 24th day of April 2006)

This appeal is directed against the judgment dated 13.12.1989 delivered by the 2nd Additional Sessions Judge, Raipur in Sessions Case No. 21/1987 whereby the appellant No.1-Panji was convicted for offence under Section 376 I.P.C. and the appellants No.2 & 3-Khamhan & Faggu were convicted under Section 376 read with Section 34 I.P.C. and each appellant was sentenced to undergo rigorous imprisonment for seven years and a fine of Rs.500/- each and in default to undergo R.I. for 2 months.

2. Briefly stated the factual matrix is that on 23.10.1986 at about 6.00 P.M. while the prosecutrix, a married woman, went to fetch water from the canal, the appellants were already present there. The applicant No.1-Panji caught the hand of the prosecutrix and dragged her to a nearby place. When the prosecutrix shouted, the appellant-Faggu gagged her mouth with a piece of her *saaree.* The appellant Khamhan caught hold of the hands of the prosecutrix and appellant-Panji commited rape on the prosecutrix. During the commission of rape by the appellant-Panji, Suklabai P.W.2, mother of the prosecutrix, arrived at the place of occurrence. The appellants ran

away on seeing her. The prosecutrix narrated the incident to her mother and returned home. Thereafter she went to the *Mirchi Badi* and informed the incident to her father Ramji, the village Kotwar. Vide Ex.P.1 F.I.R. was lodged on 24.10.1986 at 9.30 P.M. at P.S. Abhanpur situated at a distance of 18 kilometers from the place of occurrence. Prosecutrix was sent for medical examination. Dr. Sarita Dubey P.W.5, on examination, did not find any external injury or evidence of violence on the body of the prosecutrix. She found an old vaginal tear. The prosecutrix did not complain of any pain. No bleeding from the vagina was seen. She could not give any definite opinion regarding the sexual intercourse with the prosecutrix. Vaginal slides of the prosecutrix prepared by Dr. Sarita Dubey and the petticoat of the prosecutrix seized vide Ex.P.2 on 24.10.1986 were sent for examination to the Forensic Science Laboratory, Sagar. Vide report Ex.P.13, no seminal stains and human spermatozoa was detected on these articles. However, presence of blood was confirmed on both. The accused-appellants were examined by Dr. V.K.Tamrakar P.W.6 on 29.10.1986 who found the appellants capable of performing sexual intercourse. After completion of investigation, the appellants were prosecuted.

3. The appellants abjured the guilt and pleaded innocence. The prosecution examined as many as eight witnesses. The appellants examined Dularwaram D.W.1 in defence, who was not examined by the prosecution though cited. The learned trial Judge relying upon the testimony of the prosecutrix and Suklabai P.W. 2 convicted and sentenced the appellants as aforesaid in paragraph-1.

4. Shri Kishore Bhaduri, learned counsel for the appellants has assailed the conviction of the appellants on the ground that the testimony of the prosecutrix is wholly unreliable since it is not

corroborated either by medical evidence or by the report of Forensic Science Laboratory. It was also urged that the prosecutrix has made a specific assertion in her evidence that report of the incident was lodged on the night of the occurrence itself at Police Station Abhanpur which has been suppressed by the prosecution. Referring to paragraph-11 of the testimony of the prosecutrix, it was argued that medical evidence ought to have been forthcoming in view of what was stated by the prosecutrix regarding the injuries sustained by her. It was also contended that Ramji, the father of the prosecutrix and village Kotwar, to whom the prosecutrix had narrated the incident, was also not examined by the prosecution for which adverse inference ought to have been drawn against the prosecution. It was lastly contended that in view of the testimony of the prosecutrix in paragraph 2 and her admission in paragraph 10 as also the admission made by the Investigating Officer B.K.Uike P.W.8 in paragraph 13 that there was a group rivalry in the village and father of the prosecutrix had been removed from the post of Kotwar on the complaint of the villagers, it could not be ruled out that the appellants have been falsely implicated. Reliance was placed on *Sheikh Zakir v. State of Bihar* **A.I.R. 1983 SC 911**, *State of Rajasthan v. Shri Narayan* **A.I.R. 1992 SC 2004**, *Pratap Misra and others v. State of Orissa* **A.I.R. 1977 S.C. 1307 = 1977 Cri. L.J. 817**, *Sanjay Vs. State of Haryana)* **2005(3) Criminal Court Cases 294 (S.C.)**, *State Government of Manipur v. Kakchingtabam Gourachandra Sarma* **1968 Cri.L.J. 1390.** On the other hand, Shri Ashish Shukla, learned Government Advocate has argued in support of the impugned judgment while contending that corroboration by medical evidence was not expected to be forthcoming since the prosecutrix is a married woman. He also argued that the evidence of the prosecutrix was

worthy of credence and conviction of the appellants on the sole testimony of the prosecutrix by the learned trial Judge was proper.

5. Having heard the rival submissions, I have perused the record of Sessions Case No.21/87. It is settled law that a conviction can be based on the sole testimony of the prosecutrix if it inspires confidence and is worthy of credit. As held in the case of *Bharwada Bhoginbhai Hirjibhai v. State of Gujrat* **AIR 1983 SC 753** by the Apex Court if the evidence of the victim does not suffer from any basic infirmity and the "probabilities-factor" does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration, except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. Testing the testimony of the prosecutrix on the above touchstone, it is found that in paragraph 11, she has specifically narrated that she was dragged by the appellants on rough surface due to which her back, feet and thighs had sustained injuries which were also shown by her to the Doctor. In view of the positive assertion made by the prosecutrix in paragraph-11, medical evidence ought to be forthcoming in this case to corroborate the version of the prosecutrix. Dr. Sarita Dubey P.W.5 has testified that she did not find any external injury or marks of violence on the body of the prosecutrix and could not give any opinion about any recent sexual intercourse with the prosecutrix.

6. The prosecutrix has in paragraph 5 made another positive assertion that she had accompanied her father to Police Station, Abhanpur on the night of the incident and had lodged F.I.R. on the same day. She has also denied the suggestion that she had lodged the F.I.R. on the next day. However, no such F.I.R. lodged by the

prosecutrix on 23.10.1986 has been produced by the prosecution which creates a serious dent in the prosecution story.

7. Another fact which renders the testimony of the prosecutrix about the rape having been committed on her by the appellant-Panji unreliable, is the absence of any seminal stains or human spermatozoa not only on the vaginal slides prepared by Dr. Sarita Dubey P.W.5 but also on her petticoat which was seized immediately after the F.I.R. was lodged.

8. It is pertinent to note that the prosecutrix has in paragraph 2 stated that on the date of occurrence when she had gone to canal to fetch water, a quarrel had ensued between the appellants and herself since some water had got sprinkled over her from the fishing net being used by the appellants. She has alleged that thereafter the appellant-Panji had assaulted her with the handle of the bullock-cart twice on her thighs. In the absence of any corroboration whatsoever from the medical evidence, this positive assertion by the prosecutrix is also rendered untrustworthy. She has further stated that thereafter she returned home, narrated the incident to her mother whereupon her mother had also abused the appellants. A crowd of 50 - 60 persons including the appellants had surrounded their house. Thereafter a quarrel had taken place. It is pertinent to note that all these material factors were not mentioned by the prosecutrix in the F.I.R. Thus, the very genesis for the alleged commission of the offence has been suppressed by the prosecutrix in the F.I.R.

9. It is also to be noticed that the prosecutrix has stated that immediately after the appellant-Panji had started the sexual act she had shouted whereupon her mother Suklabai had arrived at the scene of occurrence and the appellants ran away on seeing her. The

prosecution has also filed the statement of Suklabai P.W.2 recorded under Section 164 Cr.P.C. which clearly shows that on hearing shouts of her daughter she reached the canal and did not see the appellants there. It is also pertinent to note that Suklabai P.W.2 has made a positive assertion in paragraph 2 of her testimony that when reached the canal and saw the appellants run away, the prosecutrix did not narrate the incident to her at that place and on returning home she had gone to call her husband from the *Mirchi Badi*. The prosecutrix has stated that she had gone to the *Mirchi Badi* and called her father. If the incident was promptly reported by the prosecutrix to her father-Ramji who was also the village Kotwar, Ramji would have been a material witness to corroborate the testimony of the prosecutrix. Non-examination of Ramji also renders the prosecution story doubtful. The prosecutrix has admitted in paragraph 10 that the villagers had made a complaint for removal of her father from the post of Kotwar. She did not deny that a fine was also imposed on her father. The Investigating Officer Mr. B.K.Uike P.W.8 in paragraph 13 has also stated that father of the prosecutrix was the village Kotwar. He has also not denied that Ramji had been removed on the complaint of the appellants from the post of village Kotwar. He also admitted that there was a group rivalry in the village. In this view of the matter, the assertion by the learned counsel for the appellants that the appellants have been falsely implicated can not, therefore, be ruled out.

10. Dularwaram though cited by the prosecution as a witness was not examined by the prosecution. The appellant examined him as a witness for the defence. His testimony that while the prosecutrix had arrived at the canal for fetching water, there was a quarrel with the appellants whereupon mother of the prosecutrix came and started abusing, thereafter he was present at the canal till 8. P.M. and did not

see the commission of the alleged offence by the appellants during that period. The testimony of Dularwaram is wholly unrebutted in cross-examination. His presence at the scene of quarrel near the canal cannot be disputed since this witness was cited by the prosecution, though not examined.

11. Having thus considered the evidence led by the prosecution in its entirety, I am of the considered opinion that the testimony of the prosecutrix does not inspire confidence and is not worth credence and, therefore, could not form the basis for convicting the appellant No.1 under Section 376 I.P.C. and the appellants No.2 and 3 under Section 376 read with Section 34 of the I.P.C. Conviction of the appellant-Panji under Section 376 I.P.C. as also conviction of the appellants-Khamhan and Faggu under Section 376 read with Section 34 of the I.P.C. and the sentences awarded by the learned trial Judge thereunder deserve to be set aside.

12. In the result the appeal is allowed. Conviction of the appellant-Panji under Section 376 I.P.C. as also conviction of the appellants-Khamhan and Faggu under Section 376 read with Section 34 of the I.P.C. and the sentences awarded by the learned trial Judge thereunder are set aside. The appellants are acquitted and they shall be set at liberty forthwith. Bail bonds of the appellants shall stand cancelled. Fine, if paid, shall be refunded.

Sd/-
Dilip Raosaheb Deshmukh
Judge